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No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

SYRACUSE PEACE COUNCIL, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the public interest standard in the Communications Act of 1934 requires that broadcast licensees act as public trustees to afford a reasonable opportunity for the discussion of conflicting views on issues of public importance.

2. If so, whether this requirement is constitutional under the First Amendment.

PARTIES BELOW

The petitioners here, Syracuse Peace Council, Henry Geller and Donna Lampert, and Office of Communication of the United Church of Christ, were petitioners below. The respondents below and here are the Federal Communications Commission and the United States of America. Intervenors below in support of petitioners were the Democratic National Committee, the Democratic Congressional Campaign Committee, and the Democratic Senatorial Campaign Committee. Intervenors below in support of respondents were Meredith Corporation, CBS, Inc., Radio-Television News Directors Association, American Newspaper Publishers Association, National Broadcasting Co., Inc., Freedom of Expression Foundation, and Reporters Committee for Freedom of the Press.

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SYRACUSE PEACE COUNCIL, *et al.*,
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v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) is reported at 867 F.2d 654. The orders of the Court of Appeals denying rehearing and rehearing *en banc* (App. 75a, 76a) are unreported. The Report and Order of the Federal Communications Commission (App. 188a) is reported at 2 F.C.C. Rcd. 5043; it incorporates the Report at 102 F.C.C.2d 143 (App. 77a). The Commission's Memorandum Opinion and Order denying reconsideration (App. 282a) is reported at 3 F.C.C. Rcd 2035.

JURISDICTION

The judgment of the Court of Appeals was entered on February 10, 1989 (App. 73a). Rehearing and Rehearing *en banc* were denied on April 25, 1989 (App. 75a, 76a). The jurisdiction of the Court is invoked under 28 U.S.C. Secs. 1254(1) and 2350(a).

STATUTE INVOLVED

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. Sec. 151 *et seq.*, are as follows:

Section 303(a)-(d), (f)-(j) (47 U.S.C. 303 (a)-(j)):

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall —

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote

public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

Section 307 (a)-(c) (47 U.S.C. 307 (a)-(c)):

(a) **Grant.** The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor, a station license provided for by this Act.

(b) **Allocation of facilities.** In considering applications for licenses, and modifications and renewals thereof, when insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) **Terms.** No license granted for the operation of a television broadcasting station shall be for a longer term than five years and no license so granted for any other class of station (other than a radio broadcasting station) shall be for a longer term than ten years, and any license granted may be revoked as hereinafter provided. Each license granted for the operation of a radio broadcasting station shall be for a term of not to exceed seven years. The term of any license for the operation of any auxiliary broadcast station or equipment which can be used only in conjunction with a primary radio, television, or translator station shall be concurrent with the term of the license for such primary radio, television, or translator station. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed five years in the case of television broadcasting licenses, for a term not to exceed seven years in the case of radio broadcasting licenses, and for, a term of not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby ... .

Section 309(a) (47 U.S.C. 309(a)):

(a) **Considerations in granting application.** Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 [47 U.S.C. Section 308] applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be

served by the granting thereof, it shall grant such application.

Section 312(a) (47 U.S.C. 312(a)):

(a) **Revocation of station license or construction permit.** The Commission may revoke any station license or construction permit —

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 [47 U.S.C. Section 308];
(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;
(3) for willful or repeated failure to operate substantially as set forth in the license;
(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;
(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;
(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code [18 U.S.C. Sections 1304, 1343, or 1464]; or
(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Fed-

eral elective office on behalf of his candidacy.

Section 315(a) (47 U.S.C. 315):

(a) **Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities.** If any license shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any —

(1) bona fide newscast,
(2) bona fide news interview,
(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the new documentary), or
(4) on-the-spot coverage of bona-fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot

coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT OF THE CASE

This petition seeks review of the judgment below,[1] affirming the orders of the Federal Communications Commission (herein the Commission or FCC) eliminating the fairness doctrine. The doctrine requires broadcasters as public trustees (1) to give adequate coverage to public issues (2) with a reasonable opportunity for the expression of conflicting views. The basic facts are as follows:

Upon complaint of the Syracuse Peace Council, the FCC in 1984 found that Meredith Corporation, the licensee of TV Station WTVH in Syracuse, N.Y., had violated the above noted second duty of the fairness doctrine when it ran a series of advertisements on the desirability of a nuclear power plant without affording the opportunity for opposing views.[2] Meredith sought reconsideration, arguing, *inter alia,* for the first time, that the fairness doctrine was unconstitutional.

While agency reconsideration was pending, the Commission issued a report on the doctrine.[3] That 1985 report concluded that

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[1]The Court of Appeals had jurisdiction pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 402(a), and 28 U.S.C. Sec. 2342.

[2]*Syracuse Peace Council*, 99 F.C.C.2d 1389 (1984).

[3]*Inquiry into Alternatives to the General Fairness Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985), herein 1985 Fairness Report. App. 77a.

the doctrine disserved the public interest, relying largely on the grounds that it was not needed in light of the growth in the number of broadcast outlets and that it chilled debate because it worked against broadcaster coverage of controversy. App. 179a. The Commission, however, declined to eliminate the doctrine, stating that it wished to defer to Congress in light of the latter's great interest, and to the courts as to constitutionality. App. 179a-180a.

In disposing of Meredith's petition for reconsideration, the Commission again refused to rule on the constitutional issue. The Court of Appeals affirmed the FCC's finding that Meredith had violated the doctrine, but remanded the case to the Commission. The court pointed out that in another decision[4] it had held that the fairness doctrine is not mandated by the statute. Because of that decision, which was issued after briefs in Meredith's review proceeding had been filed, the court ruled that the Commission had to resolve the constitutional issue, unless it were to determine that the doctrine is contrary to the public interest.[5]

The agency, after receiving comment from the general public, ruled in Meredith's favor.[6] It incorporated the 1985 Fairness Report into the record and reaffirmed the findings and conclusions therein.[7] It concluded that "...the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial

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[4]*Telecommunications Research & Action Center* v. *FCC*, 801 F.2d 501, 517-518 (D.C. Cir. 1986), *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986) (herein *TRAC*), *cert. denied*, 107 S. Ct. 3196 (1987).

[5]*Meredith Corp.* v. *FCC*, 809 F.2d 863, 873-4 (D.C. Cir. 1987).

[6]*Syracuse Peace Council*, 2 F.C.C. Rcd. 5043 (1987), *recon. denied*, 3 F.C.C. Rcd 2035 (1988). App. 187a, .

[7]*Id.* at 5066, n.120 (App. 230a).

government interest" — that it thus "...contravenes the First Amendment and thereby disserves the public interest."[8]

On appeal, the court below affirmed. In an opinion by Judge Williams, with Chief Judge Wald concurring, the panel affirmed the Commission's holding eliminating the second part of the fairness doctrine. The opinion does not reach the constitutional issues,[9] but rather affirms on the ground that the "FCC's decision that the fairness doctrine no longer serves the public interest is a policy judgment ...[to which the court owes] great deference" (App. 13a). The opinion terms reasonable or permissible the Commission's findings as to the great growth in electronic media outlets and the deterrent effects of the doctrine. App. 16a-25a.

With Judge Starr concurring and Chief Judge Wald dissenting, the opinion also upholds as reasonable the FCC's recision of the first prong of the fairness doctrine — the duty to present controversial issues. App. 30a-32a. The essential holding is that "... the Commission reasonably eliminated Part One in light of [its] findings that the explosive growth in media outlets, combined with the removal of the deterrent to controversial public issue programming imposed by Part Two of the doctrine, will adequately ensure availability of such programs" (concurring opinion of Judge Starr, App. 72a).

A petition for rehearing was denied on April 25, 1989 (App. 75a); on the same day, a suggestion for rehearing en b*anc* was denied (App. 76a).

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[8]*Id.* at 5057 (App. 277a).

[9]In a concurring opinion, Judge Starr concludes that the constitutional issue cannot be avoided, and affirms the FCC on the ground that the fairness doctrine does violate the First Amendment. App. 54a, 72a.

REASONS FOR GRANTING THE WRIT

I. The FCC's decision, as affirmed by the court below, subverts the long established public trustee concept for broadcasting, and adopts instead the print model.

It is, we submit, not possible to conceive of a case of greater importance to the regulation of broadcasting under the Communications Act than this one. The case reopens the fundamental issue long since deemed settled by the seminal decisions of this Court in *Red Lion* and *NBC*.[10] The Commission's holding, if not reversed, will subvert the public trustee or fiduciary model established in the 1934 Communications Act, and substitutes therefor a print regulatory model. Significantly, both in the last Congress and the present one, there is clear-cut recognition of the sweeping effect of the decision.[11]

The basic public interest scheme for regulation of broadcasting established in the 1934 Communications Act is set out in the above seminal cases. Radio is inherently not open to all: Many more people want to broadcast than there are available frequencies, and Government must choose one entity and — to prevent engineering chaos — enjoin all others from using the frequency.

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[10]*Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

[11]See, *e.g.*, S. 742, 100th Cong.; *infra*, n.25. Thus, Chairman John Dingell of the House Energy and Commerce Committee has stated that if the fairness doctrine is struck down, "...I will work for a new regulatory deal for broadcasting which abandons the public trustee model and looks to spectrum fees or auctions"; that while such fees or auctions are not the "best way" to provide public service, there may be "no other choice." *Television Digest*, March 7, 1988, at 1-2.

We discuss within the effect of this strong Congressional interest on this Court's disposition of this petition. *Infra*, at 22.

This scarcity — based not on the number of outlets[12] or a comparison of broadcast outlets with other media but on the number of those who seek broadcast frequencies compared to the number of frequencies available[13] — is the "unique characteristic" of radio that supports its regulatory scheme.[14] Neither the FCC nor the broadcast intervenors dispute that this same scarcity — many more people wanting to broadcast than there are available frequencies — exists today.[15]

In conferring these scarce privileges, the Government could have required the licensees to operate as common carriers. Or, as this Court pointed out in *Red Lion*, *supra*, 395 U.S. at 390-91, "[r]ather than confer monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government surely could have decreed that each frequency should be shared among all or some of those who wish to use, each being assigned a

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[12]*Red Lion* was a radio case, at a time when there were roughly 6900 radio stations; today there are roughly 10,000 radio stations. *Inquiry Concerning Alternatives to the General Fairness Obligations of Broadcast Licensees*, 2 F.C.C.Rcd 5272, 5293 (1987); *Syracuse Peace Council*, *supra*, 2 F.C.C. Rcd at 5053, App. 250a-251a. It cannot be seriously argued that the fairness doctrine is permissible at 7000 stations but at 10,000 it is not.

[13]See *Red Lion*, *supra*, 395 U.S. at 390, 399; *Fairness Report*, 48 F.C.C.2d 1, 4 n.4 (1974).

[14]See *NBC*, *supra*, 319 U.S. at 226.

[15]There are no frequencies open in the large markets where the bulk of the population resides; there is a continuing large number of comparative hearings involving multiple applicants for the same frequency or channel; and land mobile interests seek UHF broadcast frequencies and are resisted by broadcasters, claiming that they need this scarce spectrum for High Definition TV. See S. Rept. No. 100-34, on S.742, 100th Cong., 1st Sess., at 21-23 (1987) (herein 1987 Senate Report); H. Rept. No. 100-108, on Fairness in Broadcast Act of 1987, 100th Cong., 1st Sess., at 13-18 (1987) (herein 1987 House Report).

portion of the broadcast day or the broadcast week."

The Government instead decided upon a public interest licensing scheme. The broadcast applicant is a volunteer who pays no money for this scarce privilege. But it receives no property right in the frequency[16] — "no right to an unconditional monopoly of a scarce resource the Government has denied to others the right to use." *Red Lion, id.* at 391. Rather, to protect the First Amendment rights of these others, the broadcaster receives only a short term license and agrees to serve the public interest in its administration of the frequency — to be a "fiduciary" for its community. *Id.* at 390. Thus, under this scheme, "it is the rights of the viewers and listeners, and not the broadcasters, which are paramount." *Id.* The decisions of this Court to this effect are numerous.[17]

Most significantly, neither the Commission nor the court below discuss or take into account this statutory scheme. Rather, the Commission, as affirmed by the court below, drastically changes the scheme. This is shown by consideration of the leading fairness case, *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) (herein *UCC I*), involving a raging controversy in Jackson, Miss., in the early 1960's over school desegregation. The licensee of one the two television stations in Jackson, WLBT-TV, vigorously espoused only the segregationist point of view, editorializing against integration and presenting only the White Citizens Council, although blacks constituted 45% of the area's population. The Court of Appeals, in an opinion by then Judge Burger,

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[16]See Section 309(h), 47 U.S.C. 309(h).

[17]In addition to *Red Lion* and *NBC*, see, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364, 377, 381 (1984); *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395, 397 (1981); *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 799 (1978); *CBS* v. *DNC*, 412 U.S. 94, 111 (1973).

reversed the FCC's failure to hold a hearing at renewal, stating that compliance with the fairness doctrine is the "sine qua non" of every broadcast licensee if it is to obtain renewal (*id.* at 1009); that unlike a newspaper, a broadcast station "cannot be operated at the whim or caprice of its owners ... [but rather] is a public trust subject to termination for breach of duty" (*id.* at 1003).

All this is changed under the Commission's new approach, as affirmed by the court below. The station is no longer a "public trust"; it *can* be operated at the whim of its owners. Indeed, a licensee, if challenged that it presented only the segregationist point of view on this important issue, could now assert to the FCC: "I am a racist and agree only with that viewpoint, so that is all I will present on this channel over which I have been given a monopoly."[18] Incredibly, the agency will now renew that broadcaster — the antithesis of a public trustee — as serving the public interest.

This *UCC-I*-type situation will undoubtedly proliferate over time. Station owners can feel strongly about many issues — abortion, school prayer, gun control, etc. — and can now operate their stations so as to present only the viewpoint with which they agree or for which they are paid. But see *Red Lion*, *supra*, 395 U.S. at 392. Speakers with deep pockets, like unions, religious groups, business associations, etc., all could seek stations for proselytizing their viewpoints, *and only their viewpoints*, while others would be precluded.

A broadcaster clearly should not act as did WLBT-TV and be renewed as a public trustee. Such a broadcaster is not acting as a trustee for the public, including the 45% black population, in its community. Rather, common sense dictates that it is acting in

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[18]The broadcaster is of course free — and indeed encouraged — to express a viewpoint. The obligation imposed by the trusteeship is to share the frequency by affording reasonable opportunity for contrasting views.

its *private* interest — not the *public* interest. Common sense also compels the conclusion that in this statutory scheme, there is a bedrock or underlying fairness requirement that must be observed. It is for this reason that the federal licensing agency early rejected the notion of propaganda stations.[19] This particular FCC may believe that debate, and thus the public interest, is better served by such a notion, but that is emphatically not the statutory scheme, and it is the Congressional judgment to opt for a public trustee approach that governs this non-constitutional question.

Both the Commission and the court below erroneously relied upon the growth of electronic outlets, ignoring the critical consideration of continuing "allocational" scarcity (many more wanting to broadcast than there are available frequencies). Even more serious is that in the final analysis the Commission and the court below simply opt for the print regulatory model as preferable policy, and ignore the Congressional policy. Thus, the court, after holding that it is not possible to determine whether the doctrine's "overall net effect [was] to reduce the coverage of controversial issues" (App. 24a), nevertheless upholds the Commission's judgment on the ground that the policy in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), is reasonable and should govern here (App. 25a):

> ... [The Commission] was persuaded that the doctrine's deterrent effects were on the same scale as its expression-generating ones, and it plainly discounted the *value* of the latter as "governmentally-coerced speech." *Id.* Accordingly it rejected the doctrine as a matter of policy. That policy judgment seems to us by no means arbitrary or

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[19]See *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 29, 33 (1929); *Fairness Report*, *supra*, 48 F.C.C.2d at 6 n.6. The public interest standard was reenacted in the 1934 Act, thus showing Congressional ratification of fairness as an integral part of that standard. See *Red Lion*, *supra*, 395 U.S. at 380-82.

> capricious, and indeed quite similar to the Supreme Court's finding of similar value judgments implicit in the First Amendment as applied to the print media. . . .

Red Lion and its illumination of the unique status of broadcasting under the First Amendment is ignored.

Further, the agency's approach, as affirmed by the court below, would invalidate not just fairness but the entire public interest regulatory scheme at renewal. The agency's policy at renewal is to require broadcasters to present issue-oriented programming serving the needs of their community.[20] But just as in the case of fairness, the FCC could claim that this requirement constitutes "governmentally-coerced speech" that interferes with the editorial discretion of broadcasters (who might not want to present such programming) and that the print model (*Tornillo*) should govern at renewal.

II. The 1959 Amendment to Section 315(a) codifies the fairness doctrine.

The Court of Appeals decision is predicated on the holding in *TRAC*, *supra*, that the fairness doctrine is not statutorily mandated. The *TRAC* decision conflicts with the Seventh Circuit's holding in *Maier* v. *FCC*, 735 F.2d 220, 225 n.4 (7th Cir. 1984).[21]

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[20]See *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413, 1426-30 (D.C. Cir. 1983).

[21]See also *CBS* v. *DNC*, *supra*, 412 U.S. at 110, n.8, 113, n. 12; *Straus Communications, Inc.* v. *FCC*, 520 F.2d 1001, 1007, n.11 (D.C.Cir. 1976); *NCCB* v. *FCC*, 567 F.2d 1095, 1107 (D.C. Cir. 1975), *cert. denied*, 436 U.S. 926 (1978); *Green* v. *FCC*, 447 F.2d 323, 327, n.6 (D.C. Cir. 1971). *Cf. PIRG* v. *FCC*, F.2d 1060, 1066 (1st Cir. 1975).

We have shown that the public interest standard of the 1934 Communications Act mandates a bedrock fairness requirement. Here we urge that contrary to the holding of the court below in reliance upon the *TRAC* case,[22] the 1959 amendment to Section 315(a) codified the fairness doctrine, and thus also precludes the action of the FCC and the court below.

In that amendment, Congress specifically recognized that the public interest standard of the 1934 Act embodies the bedrock fairness obligation, when in exempting from the equal time requirements certain news and news-related programs, it added the proviso that

> ...Nothing in the foregoing sentence shall be construed as relieving broadcasters from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Congress thus deliberately linked the public interest requirement with the two-fold fairness obligation — to cover public issues, and to do so fairly. The entire thrust of the proviso is that the two are integrally linked, as we have shown in Point I.[23]

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[22]Judge Bork's opinion was joined by then Judge Scalia, with Senior Judge MacKinnon dissenting. A suggestion for rehearing *en banc* was denied in *TRAC* on December 16, 1986, with two judges not participating and five judges of the nine participating voting for rehearing *en banc*. See *TRAC*, *supra*, 806 F.2d at 1115.

This Court denied the petition for *certiorari* filed in *TRAC*, but we point out that the opposition relied heavily on several procedural matters militating strongly against the grant (*e.g.*, that the ruling was made in the teletext area and the FCC had a pending proceeding to determine what action should be taken overall; that Congress also had pending legislation). See Opp. of the United States in *TRAC* v. *FCC*, Case No. 86-1371, Oct. Term 1986.

[23]The majority in *TRAC* rested its holding that the statute does not require

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This view is affirmed by *Red Lion*, where the Court stated that the above quoted language

> ...makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. 395 U.S. at 380-81 (footnote omitted).

The legislative history, ignored in the *TRAC* opinion, is to the same effect.[24]

Both houses of Congress have expressed their disagreement with the holding in *TRAC*. In its 1987 House Report, *supra*, the House Committee on Energy and Commerce stated that (at 5)

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fairness almost entirely upon the use of the word "under" in Section 315, concluding that it "suggested" merely an authorization to the Commission. 801 F.2d at 518. But the parallel use in the amendment of "under" with reference to the obligation to operate in the public interest "and" the obligation to present conflicting views on public issues plainly means that in this context, "under" means "by." It cannot be suggested that the former obligation is not imposed "by" the Act. Further, a common meaning of "under" is "required by." Webster's Third New International Dictionary (1981 ed.), p. 2487.

[24]See S. Rep. No. 562, 86th Cong., 1st Sess., at 8-9, 13 (1959) (referring to the obligation under "existing law" to "operate in the public interest and ... [present] important policy issues fairly ..."); H. Rep. No. 1069, 86th Cong., 1st Sess., at 5 (1959) (language in 315(a) "is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934"); see statements of the bill's managers at 105 Cong. Rec. 17778, 17830-31, as to the binding effect of the amendment.

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> The Committee believes the Court of Appeals decision [in *TRAC*] wrongly interpreted the 1959 amendments and that the Congress did explicitly place the Fairness Doctrine in the Communications Act at this time. The Committee urges the U.S. Supreme Court to reverse the lower court's holding.

The Senate Commerce Committee used essentially identical language in its 1987 Report, *supra*, at 3.[25]

III. Red Lion continues in point as to the constitutionality of the fairness doctrine, including the alleged chilling effects.

The FCC relied heavily upon its finding that "the doctrine's overall net effect [was] to reduce the coverage of controversial issues." 2 F.C.C. Rcd at 5050, App. 237a. But if the bedrock doctrine is statutorily required (Points I and II), the FCC lacked authority to eliminate it,[26] whatever the claimed chilling effects. It could of course consider such effects in determining the most appropriate way to implement the bedrock doctrine. *Cf.* majority opinion below, App. 25a-26a.

The finding is germane to the constitutional issue. See *Red Lion*, *supra*, 395 U.S. at 392-93. But *Red Lion* continues in point and confirms the constitutionality of the doctrine.

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[25]The Senate passed S.742, The Fairness in Broadcasting Act of 1987, by a vote of 59-31. 133 Cong. Rec. S5232 (daily ed. April 21, 1987). The House passed identical legislation by a vote of 302-102. 133 Cong. Rec. H4159 (daily ed. June 3, 1987). On June 19, 1987, President Reagan vetoed S. 742, on the same grounds as the FCC's 1985 *Fairness Report*. 23 Weekly Comp. Pres. Doc. 715 (June 29, 1987); see also H. Rep 101-153, 101st Cong., 1st Sess. (1989).

[26]See *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974).

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Red Lion found that "the fairness doctrine in the past has had no such overall effect" (*i.e.*, "the net effect of reducing rather than enhancing" coverage of public issues). 395 U.S. at 393. That remains the case today. It is not just that we strongly dispute the FCC's conclusion, as based on flawed use of self-serving anecdotal material and squarely contradicted by prior FCC reports and present expert Congressional reports.[27] *Most significantly, the court below did not sustain this finding*. See *supra*, at 14; App. 24a-25a. The issue thus remains today just as "speculative" (*Red Lion*, 395 U.S. at 393).

Even assuming that it were not, *Red Lion* points out that the FCC could take effective action "to insist that [broadcasters] give adequate and fair attention to public issues" (*id.*) by implementing the first prong of the doctrine. The FCC must concede that the first prong is constitutional since it closely resembles the Commission's present policy of requiring community issue-oriented programming.[28] And it can clearly be implemented effectively, for example, by adopting the same procedure —

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[27]In 1974, after two years of full comment and study, the FCC, under Chairman Richard Wiley, found "no credible evidence" that the doctrine had a net effect of reducing coverage. *Fairness Report*, *supra*, 48 FCC2d at 8. This conclusion was reaffirmed in 1979. *1979 Fairness Report*, 74 F.C.C.2d 163, 170 (1970), *recon. denied*, 89 F.C.C.2d 916 (1982). The expert subcommittees in both houses recently came to the same conclusion. See 1987 House Report, *supra*, 20-25; 1987 Senate Report, *supra*, at 28-32. This is not surprising, since as even the FCC itself acknowledges in its present decision, the doctrine simply represents "sound journalism." See *Syracuse Peace Council*, *supra*, 2 F.C.C.2d Rcd at 5056-57, App. 273a.

[28]Indeed, the Commission argued that "...retaining both obligations would be duplicative." *Syracuse Peace Council*, 2 F.C.C. Rcd at 5048; App. . The court below, however, found that the provisions, while similar, are not duplicative because community issue-oriented programming need not be coverage of controversial issues of public importance. Concurring Op. of Judge Starr, App. 71a-72a; dissenting op. of Chief Judge Wald, App 35a-37a.

requiring each broadcaster to set out an illustrative list of programs constituting the "most significant treatment" of such controversial issues.[29]

Incredibly, the Commission eliminated the first prong, the very measure this Court pointed to as the cure to any potential problems. But in light of *Red Lion*, it cannot be seriously argued that the fairness doctrine is unconstitutional because of some "net effect" of reducing coverage when the agency so clearly has within its authority an effective means of preventing any such net effect.

As shown (*supra*, at 10-11; n.12), *Red Lion* governs the scarcity argument since it is undisputed that many more people want to broadcast today than there are available frequencies or channels. In this connection, the FCC purports to follow *Red Lion* and urges overruling the spectrum scarcity base of *Red Lion* only as *dictum*.[30] But it holds the doctrine to be unconstitutional on the ground that it "...imposes substantial burdens upon the editorial discretion of broadcast journalist and ... technological developments [media abundance] have rendered the doctrine unnecessary to ensure the public's access to viewpoint diversity... ."[31] *This means that overall numbers of media outlets renders nugatory spectrum scarcity* — that *Red Lion*, far from being followed, is overruled by the agency, and the entire public

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[29]See *Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702, 714 (D.C. Cir. 1985).

[30]See *Syracuse Peace Council, supra*, 2 F.C.C. Rcd at 5052-5057, 3 F.C.C. Rcd at 2040 n.22 (App. 247a-277a, 286a-287a). Former FCC Chairman Fowler has stated that television is just a "toaster with pictures." *Television Digest*, March 7, 1988, at 2.

[31]*Syracuse Peace Council, supra*, 2 F.C.C. Rcd at 5052; App. 246a. The Commission relies upon *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), but that case reaffirms and relies upon the public trustee/fairness concept. See 468 U.S. at 392.

trustee scheme — equal time requirements for candidates for public office,[32] reasonable access for candidates for Federal office,[33] and the requirement that broadcasters render community issue-oriented programming (*supra*, at 19) — is unconstitutional since time and again it interferes with editorial discretion in the face of "technological developments" affording diversity without such agency intervention.

IV. Elimination of the first prong constitutes clear error warranting review by this Court.

The Commission cited three grounds for eliminating the first prong. Two judges voted to affirm solely on the ground that with the chilling effect of the second prong removed, broadcasters on their own would provide an adequate amount of controversial issue programming.[34] We urge that this holding constitutes error and in an area of the greatest importance to the public interest.

For the issue is not some global or overall one, but rather whether *every* broadcaster meets its duty to contribute to an informed electorate on public issues — what has been described by the FCC in 1974 as "the single most important requirement of operation in the public interest."[35] Some number of broadcasters

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[32]Indeed, *Red Lion* makes clear that fairness and equal time are integrally related, and "in terms of constitutional principle ... are indistinguishable ... ." (395 U.S. at 391; 382-83). See also *Branch* v. *FCC*, 824 F.2d 37, 49-50 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1220 (1988).

[33]See Section 312(a)(7), 47 U.S.C. 312(a)(7); *CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981).

[34]See App. 30a-31a; concurring op. of Judge Starr, App. 71-72a; dissenting op. of Chief Judge Wald, App. 35a; see n. 28.

[35]*Fairness Report*, *supra*, 48 F.C.C.2d at 10.

(*e.g.*, entertainment video formats, home shopping, music formats) can now eschew all coverage of controversial issues, with no policy at renewal to deter such conduct. As Chief Judge Wald's dissent cogently demonstrates (App. 41a), the FCC simply wanted to rid itself of the entire doctrine, and therefore did so, without any basis or proper notice.

CONCLUSION

The issues before the Court are of the greatest importance to the operation of Title III of the Communications Act and indeed, to the nation in light of the dominant role played by broadcasting in forging public opinion on controversial issues. As stated, Congress certainly so regards the issues, and is moving again (*supra*, at 18, n.25) to enact fairness legislation.[36] In this connection, we respectfully suggest that this Court not consider this petition until mid-October when it will be known whether or not such legislation has been enacted into law. If enacted, it would, we believe, render moot the need to consider the petition.[37] If not, it would leave this most important legal issue solely for resolution by this Court.

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[36]Such legislation has been included in the "Proposed Budget Reconciliation Provisions of the Committee on Energy and Commerce," Subtitle H; Section 4702, 101st Cong., 1st Sess., and, if retained in this form, would be before the President in early October. See *Broadcasting Mag.*, July 17, 1989, at 27. See also H.R. 315, 101st Cong., 1st Sess.; H. Rept. No. 101-103, 101st Cong., 1st Sess. (1989).

[37]We believe that fairness legislation, if enacted into law, would compel the Commission to adhere to the doctrine and thus to issue an order reinstating the finding of a fairness violation by Meredith. The latter, being aggrieved, could seek review of the constitutional issue. Since the issue has been fully briefed, such review could be on an expedited basis.

Respectfully submitted,

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